C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.R. 11741

**IN THE COUNTY COURT JUDGE'S CRIMINAL COURT OF DISTRICT NUMBER ONE**

**HER MAJESTY THE QUEEN**

**versus**

**ROGER CORNELIUS RUSSELL YORKE**

David M. Meadows, Esq., and Paula Taylor, for the Crown.
Patrick J. Duncan, Esq., for the accused.

**1992, April 15, Cacchione, J.C.C. (Orally):-** The accused Roger Cornelius Russell Yorke is charged that he

> at or near Halifax in the County of Halifax Province of Nova Scotia between the 24th day of January, 1980 and the 28th day of February, 1986 did unlawfully import into Canada, foreign cultural property, to wit; Bolivian artifacts, that it is illegal to import into Canada under section 37(2) of the **Cultural Property Export and Import Act**, R.S.C. 1985 c.C-51 in contravention of section 43 of the said **Act** and did thereby commit an offence contrary to section 45(1)(b) of the said **Act.**

This is a criminal offence which carries a maximum penalty of 5 years imprisonment or a $25,000 fine or both. Although not as serious as life imprisonment offences such as drug trafficking or murder it is still a criminal offence.

Throughout most of the proceedings in relation to this charge Mr. Yorke has been unrepresented by counsel. His preliminary inquiry was held without the assistance

of counsel. On March 17th, 1992 a pre-trial conference was held with all parties present and at that time Mr. Duncan indicated that he had been retained on a limited basis retainer to deal with the cross-examination of the expert witnesses on their qualifications and to conduct a **voir dire.** Mr. Duncan further indicated that the admissibility of certain documents was being contested.

At the opening of the trial counsel for the accused challenged the admissibility of the evidence based on the alleged invalidity of the search warrant. The argument made at that time was that Mr. Yorke's rights under s.8 of the **Charter** had been violated and that a remedy under s.24(2) was being sought.

A **voir dire** was held to determine if the accused's rights under s.8 of the **Canadian Charter of Rights and Freedoms** had been violated and if so whether the evidence should be admitted or excluded under s.24(2).

In order to properly address the issue of the alleged s.8 **Charter** violation it is important to review not only the evidence which the police had in their possession at the time they sought and obtained a search warrant but also the evidence which was presented to the Justice of the Peace by the police.

The Crown in its written brief and oral argument presented after the conclusion of the **voir dire** conceded that the warrant used to search Mr. Yorke's home was invalid because the law under which it had been issued, s.111 of the **Customs Act** had subsequently been declared unconstitutional by various courts in Canada: **Nima v. McInnes** (1989), 45 C.C.C. (3d) 419 (B.C.S.C.), **Goguen v. Shannon** (1989), 50 C.C.C. (3d) 45 (N.B.C.A.), **R. v. Keifer** (Nov 9, 1990) 11 W.C.R. (2d) 245 (Ont.Gen.Div.) The Crown argued that the police displayed no **mala fides** in that they correctly relied on the law as it existed at the time. It is the Crown's position that aside from the unconstitutional nature of the **Customs Act** authorizing the issuance of a warrant, the validity of the warrant was relevant to the **bona fides** of the police officer.

In order to determine if the warrant was invalid solely because of the unconstitutionality of s.111 of the **Customs Act** or whether there were other substantive defects in the warrant tending to undermine the **bona fides** of the officers it is necessary to review both the evidence that was in the possession of Sergeant (now Inspector) White of the R.C.M.P. at the time he applied for and obtained the warrant and the information which was presented to the issuing Justice of the Peace.

On July 5th, 1988 a Canada Customs Postal Inspector intercepted a parcel addressed to the accused because he felt that the value placed on the contents was excessive. Customs officials had in the past intercepted four other parcels addressed to the accused on the basis that they might contain drugs. All of the intercepted parcels were inspected by the Custom authorities and some, if not all, were tested for the presence of drugs with negative results. Upon the determination that the parcels did not contain drugs they were forwarded to the accused. Four of the five parcels were forwarded to P.O. Box 887, Truro, Nova Scotia, and the other to 37C Miller Road, Truro, Nova Scotia. These two addresses were different from the address where it was determined that the accused resided, that is, 33 Teviot Place, Valley, Colchester County, Nova Scotia.

Upon intercepting the parcel on July 5th, 1988 a Customs Officer ran Mr. Yorke's name through the Police Information Retrieval System and found that Mr. Yorke's name appeared on the system as a 'potential importer of cultural property'. Canada Customs then 'contacted the Cultural Property people' in Ottawa who advised that U.S. Customs had informed them that Mr. Yorke's name had appeared in a raid conducted on Steve Berger's residence in February, 1988. As a result of the execution of the search warrant on the Berger residence it was determined that the accused

had been a business partner of Steve Berger with respect to the dealing of Bolivian property. There was nothing in the evidence to indicate when this relationship began or ended.

The parcel seized on July 5th, 1988, numbered VD2 was a textile weaving which had affixed to it a tag showing the number HD094. U.S. Customs was advised of this seizure and they in turn informed Canada Customs that the identification number on VD2 appeared in Steve Berger's records. The records described the article by style and physical description and showed that VD2 had been sent from Mr. Yorke to Mr. Berger. As a result of the match between the description given by U.S. Customs and the article in the possession of Canada Customs the article VD2 was seized. From Mr. Berger VD2 found its way to Rev. Ledlie Laughlin in the Archdiocese of N.Y. It was the feeling of U.S. Customs that Rev. Laughlin had sent the VD2 back to Mr. Yorke in order to escape a U.S. Grand Jury investigation which was looking into the dealings of Steve Berger. U.S. Customs sent a description of VD2 obtained from the records of Steve Berger to Canada Customs.

Customs officer Edwards contacted his U.S. counterparts who were investigating Rev. Laughlin with a view to determining if VD2 could be matched to Rev.

Laughlin's collection. The U.S. officer contacted said that VD2 did not 'ring a bell' with him but that he would speak to Rev. Laughlin's lawyers and get back to Officer Edwards. The U.S. official never did get back to Edwards and he was therefore not in a position to say if VD2 formed part of Rev. Laughlin's collection.

At some point Canadian Customs officials had VD2 examined by Professor Harold McGee, an anthropologist, who was somewhat familiar with South American artifacts but not an expert. He estimated its age at between two and three hundred years old and its value in the range of $6,000. This information caused Canada Customs to look at the previously recorded parcel from Steve Berger to Mr. Yorke and the one from an antique textile weaving specialist Mr. James Blackmon to Mr. Yorke. On this basis it was determined that it was 'possible' that the accused had been involved with other 'prohibited' cultural property importations.

On July 18th, 1988 Canadian Customs met with Inspector White of the R.C.M.P. He was at the time Sergeant White the non-commissioned officer in charge of the Customs and Excise section of H Subdivision, the largest such section in the province. At this meeting Sergeant White reviewed their file and spoke with Mr.

Edwards. On basis of his review of the Customs file and his conversation with Mr. Edwards, Sergeant White felt that their investigation gave grounds to obtain a warrant. He agreed with the Customs investigation and with their suspicions.

Sergeant White then proceeded to consult with a senior Crown attorney in the Department of Justice. In consultation with the senior Crown attorney Sergeant White drafted the information to obtain a search warrant and the warrant. Although Sergeant White could not say whether the Crown attorney saw the final typed version of either document he did indicate that the Crown was aware of the contents of both documents before they were presented to the Justice of the Peace.

Sergeant White, at the time of this investigation, was a 20 year member of the R.C.M.P. He was the N.C.O. in charge of the largest Customs and Excise section in the Province of Nova Scotia. He had no superiors in this section. He testified that he had drafted both informations to obtain warrants and search warrants in the past on numerous occasions and had on occasion acted as an advisor to other officers drafting such documents. He acknowledged having obtained a level of familiarity in the drafting of such documents and that caused him to turn to the Crown

for assistance only in the event that he was unfamiliar with a particular statute.

On July 21st, 1988 the information to obtain a warrant and the warrant were typed and Sergeant White then took them before Justice of the Peace J.D. MacDonald. He was presented with VD4 the information to obtain a search warrant and VD3 the warrant. On the basis of VD4 he issued the search warrant authorizing the officers to search the accused's private residence.

The information to obtain the search warrant states that Sergeant White has reasonable grounds for believing that the things to be searched for are in the accused's dwelling situate at 33 Teviot Place, Valley, Colchester County, and that the reasons for believing are that five shipments of things, to be searched for, imported into Canada, were addressed to the Mr. Yorke at P.O. Box 887, Truro, Nova Scotia, and at 37C Miller Road, Truro, Nova Scotia. The dates of the shipments and the names of the senders were contained in VD4 but the contents of the shipments, which were known to Canada Customs and presumably to the affiant, since he had a copy of the Canada Customs file, were not noted on VD4.

The Justice of the Peace was further advised that Mr. Yorke lived at the address of the premises to be searched, that the items contained in the five shipments

were 'alleged to be prohibited cultural property' and that they had been examined by Canada Customs officers during the importation process. The alleged items of prohibited cutural property were never identified in the information to obtain the warrant even though they had been inspected by Customs officials.

The J.P. was further advised that the accused and Steve Berger were business associates and that they dealt in Bolivian, Peruvian and Pre-Columbian artifacts. This information was not the same as that provided to Canadian Customs by their U.S. counterparts where they indicated that Mr. Yorke and Mr. Berger had been business associates. The Justice was also told that Steve Berger had been the subject of an extensive U.S. Customs investigation and that millions of dollars of artifacts had been seized from his residence and the residences of similar artifact dealers. None of these dealers were named or associated with Mr. Yorke.

This in total was the evidence presented to the Justice of the Peace. The names of the persons or companies that shipped goods to Mr. Yorke were listed on the information to obtain, however, apart from Steve Berger's link to Mr. Yorke as a business associate, none of the other names on the list were connected to Mr. Yorke as

having been business associates or being under investigation for similar offences or being dealers in prohibited cultural property.

## Duties of the J.P.

A Justice of the Peace must consider the content of the information to obtain and determine upon what is alleged in that information, both his jurisdiction to issue a search warrant and whether or not to issue it. This is a serious duty, one to which he must give his fair minded consideration and attention, especially because the application is made on an **ex parte** basis. The Justice is therefore an officer of the court and must take into account the rights of the citizen who is not represented.

Was there a determination by the Justice that he had jurisdiction over the subject matter? If the warrant is issued without sufficient material and support the Justice does so without jurisdiction and the search warrant is void. In this sense the jurisdiction of the Justice rests upon his determination or satisfaction that reasonable grounds exist. He cannot properly conclude this unless the grounds of suspicion are revealed by his informant: **Hicks v. McCune** (1921), 36 C.C.C. 141. It is the Justice himself who must be satisfied that reasonable grounds

exist and not the informant.

While acting in his judicial capacity the Justice must ensure that the procedure complies with the law generally and is authorized by the statute under which the warrant is sought. The Justice must examine the material before him judicially and conclude on the basis of the material before him (1) that an offence has been committed, (2) that the items to be searched for and seized will afford evidence with respect to the commission of the offence, and (3) that those items are presently in the premises to be searched.

The Justice is required to determine on the material before him whether credibly based probability has replaced mere suspicion. Dickson J., in **A.G.N.S. v. MacIntyre** (1982), 65 C.C.C. (2d) 129, at 141, described a warrant as

> An order issued by a Justice under statutory powers authorizing a named person to enter a specified place, to search for and seize specified property which will afford evidence of the actual or intended commission of a crime.

In the case of secondhand information the Justice must be satisfied that it is accurate and true. He must therefore examine the information provided to the informant

by the source to determine the means by which he came into the knowledge, the reliability and the veracity of the informant.

A Justice required to decide whether there is sufficient evidence to justify issuing the search warrant must be unbiased, neutral, detached as between the state and the citizen, and there must be no real or apprehended preception of partiality. The Justice acting as a judicial officer must make an assessment as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

A warrant to search has four ingredients

1. There must be a physical manifestation of the authorization to search, that is, it cannot be an oral warrant.

2. The warrant must derive its legal existence from statute law.

3. The warrant must be issued by a designated court official who must have determined the existence of the legislative pre-requisites to his satisfaction.

4. The warrant should authorize (a) an entry of a specified building, (b) to search for specified goods, (c) with a view to a specified offence.

It goes without saying that a warrant cannot be a blank cheque given to an officer to search for evidence, whatever it may be, wherever it may be. **Shumiatcher v. A.G. Sask.** (1960), 129 C.C.C. 270.

The object and purpose of the search warrant was described by Chief Justice McRuer in **Re Bell Telephone Company of Canada** (1947), 89 C.C.C. 196, at 198, as follows:

> The object and purpose of these sections is to assist the administration of justice by enabling the constable or other properly designated person to go upon the premises indicated for the purpose of procuring things that will in some degree afford evidence of the commission of an alleged crime. It is not necessary that the thing in itself should be evidence of the crime, but it must be something either taken by itself or in relation to other things, that could reasonably be believed to be evidence of the commission of the crime.

As stated previously a search warrant does not allow for an investigatory fishing trip. The law requires the informant to set down on the search warrant information his causes and grounds for suspicion, the goods he will search for, the offence alleged and that the goods are related to the offence in that they will afford evidence. The Justice must be satisfied that the goods described in the warrant will afford evidence of the commission

of an offence. The description must be sufficiently precise so that the Justice may properly exercise his judgment as to whether the goods will or will not afford evidence. Vagueness of description or generality is not conducive to this function. The test for what constitutes sufficient description of goods was set out in **R. v. Trottier** (1966), 4 C.C.C. 321, Que.C.A. In that case the court held that a description is legally adequate if the person executing the warrant can by referring to the warrant, ascertain with accuracy what is to be seized. In **R. v. Comic Legends** (1987), 40 C.C.C. (3d) 203, Alta.Q.B., the court held that while things to be seized need not be named with precision there must be sufficient particularity in the warrant so as to properly control the discretion required to be exercised by the executing officers. The court further held that an inadequate description is not merely a technical deficiency since it goes to the jurisdiction of the Justice to issue the warrant having regard to the test that the items will afford evidence.

In the case at Bar the goods to be searched for are described in the following terms: 'All cultural properties namely articles of clothing, ponchos, shawls, belts, scaves and any other form of weaving or woven cloth.' There is no limit as to what, in these generic categories, is considered to be cultural property. Even though the

informant alleged his belief that the accused was dealing in Bolivian, Peruvian, or Pre-Columbian artifacts, these particulars are not used to describe the items to be searched for nor are the items referred to as being prohibited items of cultural property.

The informant also had in his knowledge the types of items contained in the five shipments sent to the accused, since these were the items to be searched for. These items had been inspected by the Customs officials. The nature of these items was not disclosed to the Justice in the information to obtain the search warrant. The Informant was aware of the exact nature of each shipment as each had been intercepted and searched for drugs but nowhere in the information to obtain is that information given to the issuing Justice.

The informant further states in his information to obtain the warrant that the shipments to the accused 'contained alleged prohibited cultural property' but nowhere does he state his belief as to what is prohibited cultural property. Since the shipments were intercepted and examined by Canada Customs the Justice of the Peace ought to have been provided with a list of the items, their descriptions and why they were prohibited cultural property. This however was not done.

In **Re Church of Scientology and the Queen No.6** (1987), 31 C.C.C. (3d) 449, the Ontario Court of Appeal stated that scrupulous exactitude is not required in describing things to be searched for, rather the court favoured an approach relating the degree of required specificity to the nature of the offence, the circumstances of the investigation and allowing for general descriptions where it is otherwise impossible to define them with exact precision. In this case Canada Customs through their U.S. counterparts were able to obtain a very detailed description of the items seized by them on July 5th, 1988. This physical description came from the seized records of Steve Berger. Presumably those records would have contained other descriptions which could have been passed on to the Canadian authorities so that they could search for.

In general terms the description should be as specific as possible. Both the information to obtain and the warrant should contain as much detail with respect to the identity of the goods or individual items as is available to the informant. Where goods are identified only by class or type, they should be further identified by time period or as relating to a certain transaction. The officer should know, with some degree of specificness what he is looking for when he executes the warrant.

He is there to determine the existence of the goods and not what the goods are. The function of an officer executing a warrant is simply to locate, identify and remove the goods listed in the warrant. His function is not to pick and choose at his discretion nor is he there to seize all items.

In the present case the description of the articles of clothing and other forms of weaving or woven cloth was so broad that it allowed the officer to seize everything and then sift through it for evidence. This is substantiated by the bulk seizure made, in excess of 6,000 items and the number of pieces to be tendered in evidence, some 428. The description of the items to be seized in this case was so broad that it invited a speculative search. The seizing officer determined within the first ten to twenty minutes that he would seize everything and this led to what can only be described as a trawling expedition. As Hyndman J.A. said in **R. v. Solloway Mills & Company** (1930), 53 C.C.C. 261, at 264

> I do not think it was ever contemplated by the Code that anything and everything therein should be taken but such things only as may be the object of the search.

The Justice was ask to authorize the issuance of a search warrant for the accused's residence at 33

Teviot Place, Valley, Colchester County, Nova Scotia. He was also aware, based on the information before him, that four of the five shipments addressed to Mr. Yorke were sent to two different addresses. There was nothing before the Justice to confirm that P.O. Box 887, Truro related to the accused's residence and not to some other business establishment or commercial building. As well, there was nothing in the information to obtain a warrant showing that the address of 37C Miller Road was not where the items could be located. The conclusion put to the Justice was that there were reasonable grounds for believing that the goods were in the accused's residence at 33 Teviot Place, however, the basis for those reasonable grounds was not disclosed. As Martin, J.A. stated in **R. v. Debot** (1986), 30 C.C.C. (3d) 207, at 218

> On an application for a search warrant, the informant must set out in the information the grounds for his or her belief in order that the Justice may satisfy himself or herself that there are reasonable grounds for believing what is alleged. See **R. v. Noble**, supra, at p.161. Consequently, a mere statement by the informant that he or she was told by a reliable informer that a certain person is carrying on a criminal activity or that drugs would be found at a certain place would be insufficient basis for granting the warrant. The underlying circumstances disclosed by the informer for his or her conclusion must be set out, thus enabling the Justice to satisfy himself or herself that there are reasonable grounds for believing what is alleged.

As can be seen from the foregoing the Justice in this case issued this warrant on the basis of an inadequate information to obtain and he therefore acted without jurisdiction. As such the warrant was invalid.

The inadequate information to obtain related to what was to be searched for, the reasons for believing those items were prohibited cultural property, the reasons for believing that those items were to be found at the accused's residence and not at some other location and that those items would afford evidence of an offence.

A further troublesome point respecting the information to obtain the warrant is that, from the evidence heard on the **voir dire**, it is clear that the information provided by U.S. Customs to Canada Customs was that the accused had been a business partner of Steve Berger, a person under U.S. Grand Jury investigation. In the information to obtain a warrant presented to the Justice the accused was described in the present tense as being a business partner of Steve Berger. Although it would be speculative to conclude that the informant deliberately mislead the Justice this wording of the information to obtain coupled with the other deficiencies previously noted certainly shows a high degree of carelessness and a disregard for the rights of the accused.

A final and equally troublesome deficiency in the information to obtain the warrant is that the informant never pledged his belief in the grounds that he alleged. In **Royal American Air Shows Inc. v. The Queen** (1975), 6 W.W.R. 571, Alta.S.C., Kavanagh J. stated, at p.574

> The informant does not even pledge his belief that he believes the confidential information to be true, so that we have a situation of an informant saying that he has heard something, and because of that he wants to search.

The lack of the informant's pledging his belief was commented on in **R.v. Zinck** (1987), 32 C.C.C. (3d) 150, N.B.C.A., Stratton, C.J.N.B. stated at p.154

> In the present case Miller J was satisfied that an essential condition for the issuance of a search warrant had not been met, i.e., the police officer had failed to pledge his belief in the reliability of his information and that the warrant was therefore invalid. As I am unable to say that the defect in the application for the warrant here was, to track the language of Associate Chief Justice MacKinnon in the **Haley** case, either minor or technical or peripheral or remote, I would conclude that the search of the appellant's premises was unreasonable and in breach of section 8 of the **Charter**.

Based on the reasons stated above and apart from the invalidity of the warrant on constitutional grounds I find that this warrant was deficient and granted without

jurisdiction. As such, the warrant to search Mr. Yorke's premises dated July 21st, 1988 was invalid and therefore the search of his premises was warrantless.

In **Hunter v. Southam Inc.** (1985), 14 C.C.C. (3d) 97, S.C.C., at p.109, Dickson J states

> A requirement of prior authorization, usually in the form of a valid warrant, has been a constant pre-requisite for a valid search and seizure both at common law and under most statutes. Such a requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the **Charter** to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interferences.

In **R. v. LaPlante** (1988), 40 C.C.C. (3d) 63, (Sask.C.A.), Vancise, J.A. stated, at p.82

> A valid warrant has been a consistent safeguard at common law and under most statutes for assuring that the citizen's reasonable expectation to privacy is not violated. The legitimate and reasonable expectation of privacy in one's home or office is a prized right. The requirement of a warrant or prior authorization granted by some independent judicial officer in advance is designed to ensure that unwarranted and unreasonable intrusion into one's home, office or shop does not occur.

Having ruled that the warrant to search the accused's residence was invalid it is now important to look at the search itself, how it was conducted and what was seized. On July 21st, 1988 as a result of obtaining what he believed to be a valid warrant Sergeant White and Constable Gay proceeded to the accused's residence. Canada Customs officers Edwards, LeFrank and Melanson also attended there, arriving in separate vehicles.

They arrived at the accused's residence at approximately 10:30 a.m. Mr. Yorke was not there so instead of executing the warrant in his absence Sergeant White decided to wait until his return. When Mr. Yorke drove into his driveway at noon or shortly thereafter Sergeant White drove in and parked his vehicle behind that of the accused. Sergeant White identified himself, read the warrant to Mr. Yorke and gave him the police caution. Shortly thereafter Customs officers Edwards, LaFrank and Melanson arrived and served on Mr. Yorke a notice of seizure under the **Customs Act** (Form K19). This notice of seizure related to the July 5th, 1988 seizure of the weaving, VD2. At this point the accused was asked if he had any of the items listed in his warrant to which he replied 'Yes'. He was then asked if he would take the officers on a tour of his house and he agreed.

During this tour, which lasted approximately five to ten minutes, Sergeant White encountered items and would ask the accused questions about their points of origin and their value. As a result of the statements made to Sergeant White on the tour, he decided to seize the items. It is clear from the evidence of Sergeant White and Customs officers Edwards and Melanson that the accused was with them the entire time and that he explained things to them. His explanations were given as a direct result of questions being put to him by Sergeant White and the questions related to the items being seized and what they were.

The evidence is clear that Mr. Yorke was asked questions about the origin and value of the items and as a result of his answers the items were seized. The evidence also indicates that items not included in the warrant were also seized.

There were two classes of items seized that day (1) cultural property, (2) non-cultural property. With respect to cultural property the evidence establishes that the officer relied on the information he received from the accused in order to make the seizure. In regards to items of a non-cultural property nature the evidence clearly establishes that an item by item check of these things was not done. Instead the officer peeked into

a bag and seized it despite the contents appearing distinctly different from the other items seized.

Repeatedly in the evidence, the officer stated that they relied on what the accused told them as the basis for their seizure.

As a result of the search and seizure in excess of 6,000 items were removed from the accused's residence. The Crown seeks to introduce 428 items into evidence at the accused's trial. From the total seizure at the accused's residence a number of personal items such as passports, a small carpet, personal documents and children's clothing were returned to Mr. Yorke. Apart from the 428 items the Crown seeks to introduce in this trial, 197 being held for civil proceedings under the **Cultural Property Export and Import Act** while the rest, by far the majority of items, are being held pending determination under the **Customs Act** for under valuation.

Was the search and seizure in the present case unreasonable? The answer to that question must definitely be in the affirmative. This is so because the warrant was facially invalid, it was based on an unconstitutional section of the **Customs Act**, the supporting documentation was inadequate, there was a seizure of items not related

not related to the goods known to have been imported by the accused and a seizure of items not specified in the warrant. As well, there was a seizure of non-cultural property items which the officers felt 'might possibly be under valued.' On the whole, the seizure made on July 21st, 1988 can best be described as speculative and a fishing expedition.

Lamer J. in **Collins v. The Queen** (1987), 33 C.C.C. (3d) 1, at p.14, stated

> A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.

On the basis of this statement and the facts as found it is clear that the accused's rights under s.8 were violated and that the search and seizure was unreasonable. The focus must now shift to whether the evidence should be admitted or excluded. Section 24 of the **Canadian Charter of Rights and Freedoms** reads as follows

> **24** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> **(2)** Where, in proceedings under

> subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

In the present case it has been established that evidence was obtained in a manner that infringed or denied Mr. Yorke's rights under s.8. His rights under that section are guaranteed by the **Charter**. The question is now, having regard to all the circumstances, could the admission of this evidence bring the administration of justice into disrepute. The direction under s.24(2) is mandatory once the criteria are met. The burden is on the applicant to establish this on a balance of probabilities.

The **Charter** has been described as a purposive document whose purpose is to guarantee and protect within the limits of reason, the enjoyment of the rights and freedoms it enshrines. **Hunter v. Southam Inc.** (1984), 14 C.C.C. (3d) 97, (S.C.C.). Its intent is to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. The primary purpose of s.8 is to protect an individual's reasonable expectation of privacy.

Evidence that was obtained in a manner that infringed or denied the rights or freedoms guaranteed by the **Charter** is not excluded on that account alone. Another ingredient is necessary, and that ingredient is dependent on all the circumstances. It is the admission, not the obtaining of the evidence, that is the focus of attention, though the manner in obtaining the evidence is one of the circumstances to be considered. Evidence improperly obtained is **prima facie** admissible. As pointed out by Lamer, J. in **Collins v. The Queen** the purpose of s.24(2) is to prevent the administration of justice from being brought into further disrepute.

In examining all the circumstances the factors to be looked at are as follows: **(1)** What kind of evidence was obtained? **(2)** What **Charter** right was infringed? **(3)** Was the **Charter** violation serious or merely technical in nature? **(4)** Was it deliberate, willful or flagrant or was it inadvertent or committed in good faith? **(5)** Did it occur in circumstances of urgency or necessity? **(6)** Were there other investigatory techniques available? **(7)** Would the evidence have been obtained in any event? **(8)** Is the offence serious? **(9)** Is the evidence essential to substantiate the charge? **(10)** Are other remedies available?

The trial process is a key part of the administration of justice. It is therefore important that the trial be fair. In **Collins v. The Queen**, at p.19, Lamer states

> If the admission of the evidence in some way effects the fairness of the trial, then the admission of the evidence would tend to bring the administration of justice into disrepute and subject to a consideration of other factors, the evidence generally should be excluded. ...Real evidence that was obtained in a manner that violated the **Charter** will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the **Charter** and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the **Charter**, the accused is conscripted against himself through a confession or other evidence eminating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Such evidence will generally arise in the context of an infringement of the right to counsel.

In the case at Bar the applicant argues in his written brief that Mr. Yorke was detained by the police on July 21st, 1988 when they executed the search warrant on his premises and because of the detention he should have been given his rights under s.10(b) of the **Charter**. It is further argued that without the accused's cooperation

and his own statements, there would have been no basis to seize the vast majority of items. As such the accused was conscripted against himself.

The Crown, in reply, argues that it has been ambushed since no questions were asked of the witnesses about the accused's detention, and because there is no factual foundation that the accused was conscripted against himself. The Crown states that the entire area of a s.10(b) violation should not be examined since the Crown received no notice of this, thereby being unable to call evidence on this point. The Crown also contends that the accused volunteered to help the police search his house. The Crown states that it is not seeking to introduce the accused's statements only the real evidence which was found on the search. The Crown candidly admitted having spent one week preparing for a s.10(b) argument.

With due deference to counsel for the Crown the issues of the accused's detention and his rights under s.10(b) were clearly within the ambit of this case. They ought to have been and in fact were foreseen. On the simple facts of the execution of the warrant and the subsequent tour of the accused's residence with the attendant questioning by the police officers as to the nature, points of origin and value of items, the issue

or detention was alive and part of the case.

In **R. v. Therens** (1985), 18 C.C.C. (3d) 481, at 505, LeDain J. stated

> Although it is not strictly necessary for purposes of this case, I would go further. In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of the police authority. Rather than risk the application of physical force or prosecution for willful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be affected without the application or threat of application a physical restraint if the person concerned submits or acquieses in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

The accused upon arriving home in his motor vehicle was met by the R.C.M.P. who parked their motor vehicle behind his in the driveway. He was told of the existence of a search warrant, the warrant was read to him and

immediately thereafter he was given a police caution. He was then served with a seizure document (K19) by Canadian Customs officials and asked if the items listed on the warrant were in his premises. He was then asked to give the officers a tour of his house and on this tour the accused was asked questions about the nature of the items seen, their points of origin and their value. Based on these questions and answers the items were seized. The accused remained in the presence of the police officers during their entire stay, some four and a half hours. If the accused was not detained why would the officer feel it necessary to give him a police caution? If the officer knew what he was looking for why would he have to ask those questions of the accused?

I am satisfied on the evidence before me that the accused was detained as defined by LeDain J. in **R. v. Therens**. I am also satisfied that he was not given his right to counsel under s.10(b) of the **Charter**. As the Crown is not seeking to admit his statements as part of their case, the accused words in and of themselves cannot be said to be self-incriminating. However as Dickson, C.J.C. pointed out in **R. v. Genest** (1989), 45 C.C.C. (3d) 385, S.C.C., at p.403

One factor to consider in assessing the

> fairness of the trial is whether an accused is forced to assist the Crown to build the case against himself or herself. The common law has recognized that it is up to the Crown to prove the case entirely, and that it is unfair to conscript accused persons against themselves. In this case, the appellant seeks to have real evidence excluded. The evidence was not created by the breach of a **Charter** right, nor was it found by forcing the appellant to participate in the illegal search or to identify the object seized in the search. On the facts of this case I do not think that the admission of the evidence would have an unfair effect on the trial.

On the facts of the present case it is clear that without the accused's cooperation and statements there would have been no basis to seize a large portion of the items ultimately seized. It is true that the items are real evidence in the phsycial sense and that they existed prior to the **Charter** violation. But had it not been for the s.8 violation the police would not have seen those items and without the accused's statements after the s.8 violation they would not have known them to be evidence. I am satisfied that the accused was called upon to participate in an illegal search and to identify the objects seized in that search. Items could not have been seized without the accused's participation. This evidence in my view was derived from the violation of the accused's rights under s.8. Since the police relied on the accused's statements obtained in breach of his s.8 rights it is

immaterial whether or not his s.10(b) rights were also breached. The admission of this evidence goes directly to the fairness of the trial.

**Seriousness of the Charter Violation**

Was the violation of the accused's rights under s.8 inadvertent or technical or committed in good faith or was it deliberate, willful or flagrant?

There is no doubt that in terms of a residential search this one was conducted in the manner that was minimally disruptive; for example, no physical force was required to open any areas to be searched nor was damage done to the property. On the other hand, over 6,000 items were taken on the basis of an invalid search warrant. The insufficiencies in the information to obtain the warrant and the warrant itself have been addressed previously. The warrant granted was so broad that it amounted to permission to conduct a fishing expedition. The information to obtain and the warrant were prepared by a senior police officer well versed in the preparation of such documents. These documents were prepared in consultation with a senior Crown attorney. The information to obtain a warrant contained information which was a variance with the information available to the informant. The informant

did not even attest to his belief in the information he received. There was no basis for concluding on the information to obtain the warrant that the goods would be found in the accused's residence. The totality of these circumstances can only lead to the conclusion that the **Charter** violation was not merely technical but in fact serious.

I am satisfied upon reviewing the evidence and my findings that the breach of the accused's right to be free from unreasonable search or seizure was a serious one. Although I cannot conclude that the breach was deliberate or willful I am satisfied that it was flagrant and as such I am unable to say that the officers were acting in good faith. As Martin J.A. stated in **R. v. Harris and Lighthouse Video Centres Ltd.** (1987) 35 C.C.C. (3d) 1 (Ont.C.A.), at p.27

> I do not hold however that an honest belief, however unreasonable, that a search warrant is valid, precludes the rejection under section 24(2) of the evidence obtained under the invalid warrant. The provisions of section 24(2) are not intended to place a premium on remaining in ignorance of proper procedures. There may be cases where ignorance of the requirements for the granting of a valid search warrant, or of the necessity for a proper description in the warrant of the things to be searched for, is so glaring that a search or seizure under the invalid warrant would result in the obtaining of evidence in

> contravention of the **Charter** in such circumstances that its admission is capable of bringing the administration of justice into disrepute. That is not the case here. The entire circumstances by which the evidence was obtained must be considered.

The Crown in oral argument has urged that I consider that the officers were acting in circumstances of urgency. The reasoning for this proposition is that items were being shipped out of the United States by persons seeking to escape a Grand Jury investigation and therefore there was a likelihood that the accused would do the same. The difficulty with this argument is that the search and seizure from Steven Berger's residence took place in February, 1988, some five months before this search and seizure. There was only one item sent from the U.S. to the accused after February, 1988 and that did not come until July, 1988. Unlike the situation involving narcotics where the evidence can disappear quickly this case involves items which one would think would not be easily disposed of. There was no evidence before me showing any degree of urgency or necessity which could account for or in some way explain the violation that took place in this case.

Although not referred to in argument I wish to deal with the use of other investigatory techniques.

Customs officials and presumably the R.C.M.P. on their own or through their close cooperation with Canada Customs could have obtained details from their U.S. counterparts as to the dealings between Steve Berger and the accused. Since Steve Berger's records were seized and through these records the officials were able to determine that exhibit VD2 had gone from the accused to Steve Berger and then some how to Rev. Laughlin and finally from Rev. Laughlin back to the accused. Since these records contained a detailed description of the item, it would have been possible for the police to get a detailed list and description of items that might have been in the accused's possession. This was not done, instead the police chose to proceed via a broadly worded search warrant some three days after taking over the file from Canada Customs.

It is worth noting that ss.44 and 45 (now 50 and 51) of the **Cultural Property Export and Import Act** place a mandatory duty on Customs officers to satisfy themselves that the exporter or importer has not contravened any provision of that Act. In the present case there were five shipments sent to the accused which were intercepted and examined by Customs officials. These shipments were then sent on to the accused despite the mandatory directives in ss.44 and 45. As Lamer, J. stated in **Collins**, at p.20

> I should add, that the availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the **Charter** tend to render the **Charter** violations more serious. We are considering the actual conduct of the authorities and the evidence must not be admitted on the basis that they could have proceeded otherwise and obtained the evidence properly. In fact, their failure to proceed properly when that option was open to them tends to indicate a blatant disregard for the **Charter**, which is a factor supporting the exclusion of the evidence.

In conclusion, the test to be applied was stated by Lamer, J. in **Collins v. The Queen**, at p.16, where he stated

> It is whether the admission of the evidence would bring the administration of justice into disrepute that is the applicable test. Misconduct by the police in the investigatory process often has some affect on the repute of the administration of justice, but section 24(2) is not a remedy for police misconduct, requiring the exclusion of the evidence if, because of this misconduct, the administration of justice was brought into disrepute. Section 24(2) could well have been drafted in that way, but it was not. Rather, the draft (sic) of the **Charter** decided to focus on the admission of the evidence in the proceedings and the purpose of section 24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing or from judicial condonation of unacceptable conduct

> by the investigatory and prosecutorial agencies. It will also be necessary to consider any disrepute that may result from the exclusion of the evidence. It would be inconsistent with the purpose of section 24(2) to exclude evidence if its exclusion would bring the administration of justice into greater disrepute than would its admission. Finally, it must be emphasized that even though the inquiry under section 24(2) will necessarily focus on the specific prosecution, it is the long term consequences of regular admission or exclusion of this type of evidence on the repute of the administration of justice which must be considered: see on this point **Gibson, ibid,** p.245.

The Crown has urged me to consider the damage to Canada's prestige in the International community if this court should exclude the evidence thereby preventing the Crown from even trying this case. I have considered that factor as well as the cost of these proceedings and the deployment of scarce court resources on this case. I have however come to the conclusion that these factors are not the ones that must be emphasized. I am excluding the evidence because of the flagrant and serious disregard for and violation of the accused's rights under s.8 and because the accused was conscripted against himself. The admission of evidence obtained in that fashion would be tantamount to the court's condonation of police misconduct. It would send a message to the community that the police can flagrantly disregard a person's rights guaranteed under the **Charter** and still have the evidence admitted

because to do otherwise would affect Canada's political prestige or because a great deal of resources have been spent on the prosecution. To follow this course would in my opinion bring the administration of justice into greater disrepute.

The applicant has discharged his burden by establishing on a balance of probabilites that the admission of the evidence would bring the administration of justice into disrepute and I accordingly order that the evidence be excluded.

A Judge of the County Court
of District Number One